

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

74-2319

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

FRANK BREEN,

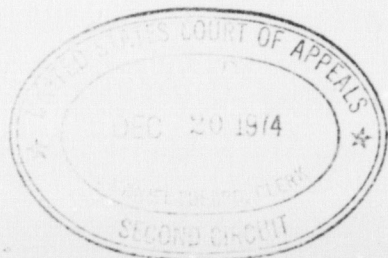
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

Appellant's Appendix

THEODORE KRIEGER
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INDEX TO APPENDIX

Minutes of Hearing

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1 THE CLERK: Eight pages of letters marked
2 Government's Exhibit 52 for Identification.

3 Criminal cause on trial, United States of
4 America against Frank Breene and John Indiviglio.

5 THE COURT: Both sides ready?

6 MR. WEINTRAUB: Ready, your Honor.

7 MR. KRIEGER: Ready, your Honor.

8 MR. WEINTRAUB: The Government calls Officer
9 Schmidt.

10 J A M E S S C H M I D T, having been first duly
11 sworn by the Clerk of the Court, testified as
12 follows:

13 THE CLERK: State your full name for the
14 record and spell it, please.

15 THE WITNESS: James Schmidt, S-c-h-m-i-d-t.

16 DIRECT EXAMINATION

17 BY MR. WEINTRAUB:

18 Q Officer Schmidt, by whom are you employed?

19 A The Incorporated Village of Northport Police
20 Department.

21 Q How long have you been employed there?

22 A Six years.

23 Q In what capacity?

24 A As a patrolman.

25 Q Where do you live?

A I live in East Northport.

1 Q Are you acquainted on a social basis with an
2 individual named Frank Breene?

3 A Yes.

4 Q Do you see him in Court?

5 A Yes.

6 MR. KRIEGER: Conceded.

7 Q Did you have occasion to see Mr. Breene in
8 May of 1974 during that month?

9 A Approximately around there, yes.

10 Q Tell us the circumstances?

11 A I had occasion to go into the City to pick him
12 up from a bar somewhere around 8th Avenue. I don't recall the
13 name.

14 Q How did you happen to go pick him up?

15 A I was out there where my in-laws work and the
16 phone rang and it was Mr. Breene --

17 MR. KRIEGER: May I sit a little closer?

18 THE COURT: Yes.

19 Q Try to speak up.

20 You received a phone call from Mr. Breene?

21 A The bar itself received a call and I answered
22 the phone and he said he was pretty well under the weather
23 and needed a ride out and I went out to pick him up.

24 Q Did you have a conversation with him?

25 A Yes, I did.

Q Would you tell us the substance of the

1
2 conversation -- where was the conversation had?

3 A In the bar on 8th Avenue.

4 Q Where you came to pick up Mr. Breene?

5 A Right.

6 Q Will you tell us what you said to him and what
7 he said to you?

8 A Well, it was a regular conversation for awhile
9 and then Mr. Breene stated: "You know, they are trying to put
10 me away for 20 years."

11 At that time I didn't know what he was talking
12 about. I just said, "Yeah." I thought he was bombed.

13 He said, "They found the 350,000 but there was
14 another 90,000 in the trunk of the car."

15 I said, "What car?" And the conversation ended.

16 Q He didn't respond to that?

17 A Yes.

18 Q You weren't aware that he was under indictment
19 by the Federal Government for a narcotics violation at that
20 time?

21 A No, sir.

22 MR. WEINTRAUB: I have no further questions.

23 MR. KRIEGER: May I have your Honor's
24 indulgence for a moment?

25 THE COURT: You are claiming this is an in
custody statement?

1
2 MR. KRIEGER: No -- I withdraw that. I
3 reserve whatever rights might accrue to my client in-
4 sofar as a non-custodial admission without the giving
5 of the Miranda rights.

6 My fundamental thrust is the voluntariness of
7 the purported statement.

8 THE COURT: I think that is a statement of fact
9 for the jury.

10 I do not know how drunk he was. I do not know
11 how much he had control over the statements he made,
12 but we are talking about a non-custodial statement.

13 MR. KRIEGER: Under Jackson v. Denno, the rule
14 is paramount. The question of voluntariness must
15 be initially determined by the Court.

16 THE COURT: I understand that. I do not doubt
17 that. The thing I am wondering about is what the real
18 issue is, whether he was so drunk that he didn't know
19 what he was saying.

20 MR. KRIEGER: Therefore, any statement would
21 not be voluntary.

22 THE COURT: I understand.

23 [I can tell from the context of the conversation
24 that he knew enough about what was happening so he
25 understood what he was saying.

Mind you, that he talks about 350,000 dollars

1
2 found and that Matteo was shot and there was 90,000
3 more in the trunk.]

4 MR. KRIEGER: There was nothing about Matteo
5 being shot.

6 THE COURT: But \$90,000 more in the trunk of
7 the car.

8 All right, go ahead.

9 MR. KRIEGER: All right. Thank you.

10 THE COURT: When you say that before he made
11 those statements you talked about other things, tell
12 us what other things you talked about and whether he
13 was logical in your own mind.

14 THE WITNESS: We shot a game of pool.

15 THE COURT: At the bar?

16 THE WITNESS: Yes, sir.

17 THE COURT: Was he steady?

18 THE WITNESS: No.

19 THE COURT: Did you complete the entire race?

20 THE WITNESS: Yes.

21 THE COURT: More than one rack?

22 THE WITNESS: No, sir, one game.

23 THE COURT: Are you a good pool player?

24 THE WITNESS: Not as good as Mr. Breene.

25 THE COURT: How did you do that day?

1 THE WITNESS: I beat him.

2 THE COURT: How did you beat him?

3 THE WITNESS: I ran the table on him.

4 THE COURT: Could he hold a cue?

5 THE WITNESS: Yes, sir.

6 THE COURT: What else did you talk about?

7 THE WITNESS: Just general, your know, how are
8 you doing, what's happening, and that type of thing.

9 THE COURT: Any question about his recognition
10 of you?

11 THE WITNESS: No, sir, we have known each other
12 for about 8 months.

13 THE COURT: Was the conversation in point or
14 did he wander?

15 THE WITNESS: I guess you could say he wandered
16 a little bit.

17 We were talking about something else and this
18 came in and at that time I didn't have the slightest
19 idea what he was talking about. I just thought it
20 was mumble.

21 THE COURT: Did he go to your car?

22 THE WITNESS: Yes, I drove him back to the
23 Island.

24 THE COURT: Did he have to be helped to get
25 into the car?

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THE WITNESS: No, sir.

THE COURT: Did he do any drinking while he was with you?

THE WITNESS: No, sir.

THE COURT: What was he drinking?

THE WITNESS: I really don't remember.

THE COURT: Was it hard liquor or beer?

THE WITNESS: I believe it was Scotch. I was drinking the same thing.

THE COURT: Did he tell you how much he had had before?

THE WITNESS: No, sir.

THE COURT: Did he tell you how long he had been at the bar?

THE WITNESS: No, sir.

THE COURT: Go ahead.

CROSS EXAMINATION

BY MR. KRIEGER:

Q At the outset, Officer, is it your testimony that somebody at the bar called you up and asked you to look after Mr. Breene?

A No, sir.

Q Who called you?

A Mr. Breene called the bar where my in-laws

1
2 work on the island. I was there. I answered the phone.

3 Q He asked you to come out and get him because he
4 couldn't get home?

5 A He said he was drinking -- there was no trains
6 and he had been drinking. I told him to stay put and that I'd
7 go out and get him.

8 THE COURT: Was that true that there were no
9 trains?

10 THE WITNESS: I don't know.

11 THE COURT: What time was this?

12 THE WITNESS: Around 11:00, 12:00 o'clock at
13 night.

14 THE COURT: What part of the island was he
15 trying to get to?

16 THE WITNESS: Northport.

17 THE COURT: That would be interesting to know
18 how well oriented he was, whether there was really no
19 trains or whether he was imagining this.

20 Why don't you get me a Long Island Railroad
21 schedule.

22 Q You then drove from Northport into the City
23 to pick him up?

24 A Yes, sir.

25 Q What time did you get into the bar?

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2 A Estimating about 12:30, 1:00 o'clock in that
3 area.

4 Q How long did it take you to get from Northport
5 to the bar?

6 A Forty minutes.

7 Q Where was the bar?

8 A It's on Main Street in the Village of Northport --
9 the bar I left from or --

10 Q The bar he was in?

11 A 8th Avenue on 48th or 42nd.

12 Mr. Breene gave me directions on the phone. I
13 don't recall.

14 THE COURT: Did he give you the directions on
15 the phone or did you know where the place was?

16 THE WITNESS: He told me where the place was.
17 I didn't know nothing about the place, sir.

18 Q What exactly did he say to you when he called
19 you up?

20 A Just about what I told you, he was trying to
21 get out to the island. He had been drinking, he couldn't get
22 a train, and I told him to stay put, that I'd come in and
23 get him.

24 Q Did he tell you the location of the bar?

25 A Yes.

Q What did he tell you?

A That it was -- I go down the Long Island Expressway, to the Midtown Tunnel, go on Second Avenue -- I don't recall exactly --

Q Did he give you the location of the bar?

A Yes, Eighth Avenue and 48th Street. It was fresh in my mind then. I don't recall now.

Q All right, when you got there, did you see Breene?

A Yes, I did.

Q And where was he when you first saw him?

A He was sitting at the bar when I walked into the bar.

Q Did he have a drink in his immediate presence?

A Whether it was in his hand, I don't recall, but he had been drinking.

Q He not only had been drinking, but there was whiskey right within his immediate presence, either in his hand --

THE COURT: Mr. Breene, you'll have to spend a lot of time. I believe he was drinking.

MR. KRIEGER: Very well.

THE COURT: It doesn't matter much that this police officer saw him take a few extra drinks.

1
2 Let us not spend a lot of time on irrelevant
3 matters.

4 How drunk only Mr. Breene can tell me. If he
5 can tell me, maybe he wasn't so drunk.

6 MR. KRIEGER: If your Honow has made a determin-
7 ation that Breene was drunk, I am going to argue from
8 that. I won't have any further questioning.

9 THE COURT: What does drunk mean? That he didn't
10 have full coordination? Of course not. He couldn't
11 play a full game of pool and Police Officer Schmidt
12 beat him at a rack of pool. That is some evidence
13 that he didn't have full coordination.

14 Was he able to think? Was he able to call
15 Mr. Schmidt? Did he know where he was? Did he know
16 where he usually worked? Did he give him directions
17 to get to the bar? Does that show a thinking process?

18 The mere fact someone doesn't have his full
19 coordination does not mean he is not aware of what he
20 is saying.

21 I do not know what drunk means, because I
22 happen not to be a drinker, but I have spoken to people
23 that professed to be drunk and they could speak --
24 sometimes with a little difficulty -- but what they
25 said made sense.

Does being drunk mean that you are not aware

1 of what you are saying?
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3 Maybe you are a better expert than I am. I do
4 not know. Looking at you, I cannot tell.

5 (continued next page.)
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2 MR. KRIEGER: Judge, I do not drink either, but
3 this is the first time that I had to probably state that
4 I regret it. I might be more expert on it. The issue
5 is not the effect of inebriation as such, save as to
6 how it affects the ability of one accused of a serious
7 crime to voluntarily make an admission and the only
8 issue is of the voluntariness under those circumstances,
9 whether the extent of the inebriation was such that
10 anything that he said was the babbling of a mind that
11 had been clouded by alcohol.

12 THE COURT: How many drinks did you see him take?

13 THE WITNESS: I would say we were in the bar for
14 approximately 45 minutes to an hour, maybe three.

15 THE COURT: Three over the period of 45 minutes
16 to an hour?

17 THE WITNESS: That's an estimate.

18 THE COURT: All right, anything else?

19 MR. KRIEGER: Yes, I would like to complete my
20 examination if I can, your Honor.

21 CROSS EXAMINATION

22 BY MR. KRIEGER: (cont.)

23 Q When was this alleged statement made with
24 respect to that period of 45 minutes -- at the beginning?

25 A I would say it was more in the middle.

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2 Q More in the middle. During the period of time
3 that you were there, how many drinks did you have?

4 A Three, four.

5 Q And had you had anything to drink that night?

6 A Yes, I just walked into the bar at Northport.
7 I had a drink out there, too.

8 Q When did you first report this purported
9 conversation?

10 A I had occasion to speak with a Lieutenant
11 John Thompson approximately three weeks ago, I guess, and we
12 got discussing this case and it turned out that I knew the
13 same subject and that is how one thing led to the other.

14 Q You did not report this conversation to any law
15 enforcement authority for a period of some five or six weeks?

16 A That's correct.

17 Q And naturally you have no notation as to this --
18 didn't make any report as to it?

19 A No, sir, I didn't know anything was involved.

20 Q And you didn't make any arrest of Mr. Breene?

21 A No.

22 Q And is it your testimony that you had never
23 known of his legal difficulties, sofar as this matter is
24 concerned, until he had divulged it to you that night?

25 A Yes -- no, I did not know and even after he

A14

1 said that, I didn't realize what it was all about.

2
3 Q Isn't it a fact that he had been living with your
4 in-laws?

5 A He had spent some time there.

6 Q Isn't it a fact that you and he were out socially
7 a good deal?

8 A We ran across each other, yes.

9 Q Isn't it a fact that the sociability extended
10 to the fact that you had loaned him your camper -- your
11 trailer?

12 A Yes, sir.

13 Q Isn't it a fact that you told your in-laws that
14 they shouldn't spend any time with Mr. Breene?

15 A After I realized the involvement -- after I
16 had spoken with two agents, I recommended that they not
17 associate with him.

18 Q That would have been just a month ago?

19 A That's when it was.

20 Q Now, you had told Agent Valdi that Breene was
21 obviously drinking to excess, had you not?

22 A Yes, I did.

23 Q And is it your testimony here this morning that
24 he still was "obviously drinking to excess?"

25 A Yes, sir.

A15

1
2 THE COURT: In your opinion, was he well-oriented
3 as to time and place?

4 Did he know where he was?

5 THE WITNESS: He knew where he was as far as
6 time goes -- the man was bombed -- he was drunk.

7 THE COURT: All right.

8 MR. KRIEGER: I have nothing further.

9 MR. WEINTRAUB: No further questions.

10 THE COURT: You may step down.

11 MR. KRIEGER: I rest on the record and submit
12 that any purported statement was not voluntary. The
13 man was not in any condition to make any statement
14 which would warrant or rise to the dignity of an
15 admission being submitted to this Court and even have
16 a jury deliberate thereon.

17 THE COURT: Are you willing to rest on the
18 witnesses' testimony? You said that Mr. Breene was going
19 to testify -- yesterday that was your representation.

20 MR. WEINTRAUB: That is correct.

21 MR. KRIEGER: May I have your Honor's indulgence
22 for a second?

23 THE COURT: As a matter of fact, it is uncertain
24 as to how this goes.

25 This is your objection and some cases say you

1
2 must show first some basis for the objection and then
3 the Government must prove beyond a reasonable doubt
4 that it was voluntary.

5 MR. KRIEGER: That may be academic.

6 May I have your Honor's indulgence for a second?

7 (Recess taken.)

8 MR. KRIEGER: If your Honor pleases, in light
9 of the report which had been furnished me and in light
10 of this witness' testimony, I rest.

11 THE COURT: [All right, based on the testimony
12 of Police Officer James Schmidt, I find that the defen-
13 dant called Police Officer Schmidt and told him he had
14 been drinking, told him where he was, advised him how
15 to get there from Northport, told him that he couldn't
16 get back to Northport because there were no trains
17 scheduled, and there is no reason to believe that was
18 erroneous and the defendant hasn't offered any proof
19 that this was just an illusion of his or a misjudgment
20 of some kind attributable to the drinking.

21 The fact that they both consumed three extra
22 ounces, I assume, of a hard liquor over a period of
23 45 minutes, leads me to believe that this defendant was
24 fully aware of what he was saying. He must have been
25 oriented as to time and place, because he called the

1 police officer, told him where he was, gave him all the
2 other information which apparently turned out to be
3 correct. His coordination was somehow impaired by the
4 liquor, but that does not mean that his thinking process
5 was impaired to the same degree and so I find that the
6 defendant Breene knowingly and voluntarily made the
7 statement in which he in effect said, "I am in trouble,
8 they are trying to put me away for 20 years. They
9 found \$350,000 and there was \$90,000 more in the trunk
10 of the car."

11 You have an exception.]

12 MR. KRIEGER: Thank you, sir.

13 If your Honor pleases, may I make two applications?

14 One, could we have a resolution with respect to
15 Suffolk County -- Nassau County Grand Jury testimony
16 as to Mrs. Somas?
17

18 What is the situation on that -- the Suffolk
19 County rather?

20 MR. WEINTRAUB: I represented to Mr. Krieger
21 that we'd attempt to get that Grand Jury testimony if
22 in fact the District Attorney in Nassau County
23 advised us that it had relation to this case or to
24 Mrs. Somas' testimony to be more precise.

25 I really didn't have the manpower or the time

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of Dec. 1974 deponent served the within *affidavit* upon *M.S. Attorney*

attorney(s) for *Appellee*

in this action, at

*225 Cadman Plaza East
Brooklyn, N.Y.*

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this

20 day of *Dec.* 1974

William Bailey
WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976

